## APPENDIX A

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

No. 06-35679

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; LYNN CANAL CONSERVATION,

*Plaintiffs-Appellants,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY J. GALLAGHER, Colonel, in his official capacity as District Engineer; LARRY L. Reeder, in his official capacity as Chief of the Regulatory Branch; DOMINIC IZZO, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); UNITED STATES FOREST SERVICE,

*Defendants-Appellees,*

and

COEUR ALASKA, INC.; GOLDBELT, INC.; STATE OF ALASKA,

*Defendants-Intervenors-Appellees.*

Appeal from the United States District Court for the District of Alaska

James K. Singleton, Senior District Judge, Presiding

Argued and Submitted December 4, 2006—San Francisco, California

Filed May 22, 2007

Before: Procter Hug, Jr., A. Wallace Tashima, and Susan P. Graber, Circuit Judges.

Opinion by Judge Hug

**COUNSEL**

Thomas S. Waldo and Demian A. Schane, Earthjustice, Juneau, Alaska, for plaintiffs-appellants.

John T. Stahr and Mark A. Nitczynski, U.S. Department of Justice, Environment & Natural Resources Division, Washington, D.C., for defendants-appellees.

David J. Burman and Robert A. Maynard, Perkins Coie LLP, Boise, Idaho; John C. Berghoff, Jr., and Michael P. Rissman, Mayer Brown Rowe & Maw LLP, Chicago, Illinois; Cameron M. Leonard, State of Alaska, Department of Law, Fairbanks, Alaska; and David C. Crosby, David C. Crosby PC, Juneau, Alaska, for defendants-intervenors-appellees.

Melissa Powers and Allison LaPlante, Pacific Environmental Advocacy Center, Portland, Oregon; Joseph M. Lovett, Appalachian Center for the Economy & the Environment, Lewisburg, West Virginia; and Peter Van Tuyan, Bessenyey & Van Tuyn, Anchorage, Alaska, for *amici curiae* in support of plaintiffs-appellants.

John W. Hartle, City and Borough of Juneau, Juneau, Alaska; Amy Gurton Mead, Robertson, Monagle & Eastaugh, Juneau, Alaska; Steven J. Lechner, Mountain States Legal Foundation, Lakewood, Colorado; Michael R. Shebelskie, Hunton & Williams LLP, Richmond, Virginia; Harold P. Quinn, Jr., National Mining Association, Washington, D.C.; and Stephen F. Sorensen, Simpson, Tillinghast & Sorensen PC, Juneau, Alaska, for *amici curiae* in support of defendants-appellees.

**OPINION**

HUG, Circuit Judge:

This case presents the question of whether the issuance of a permit by the U.S. Army Corps of Engineers violates the Clean Water Act.[1] The permit issued in this case authorizes Coeur Alaska, Inc., to discharge process wastewater containing tailings from its gold mine into a lake that is a navigable water of the United States. Coeur Alaska proposes to discharge daily 210,000 gallons of process wastewater containing 1,440 tons of tailings from its mine into Lower Slate Lake. The tailings in the discharge will raise the bottom elevation of the lake by 50 feet. A 90-foot high, 500-foot long dam will be built to contain the discharge and the area of the lake will be increased about three-fold. The U.S. Army Corps of Engineers contends that the permit was properly granted under § 404 of the Clean Water Act, which relates to the disposal of "fill material," and that it is not subject to the effluent restrictions of § 301 or § 306 of the Clean Water Act. The plaintiffs contend that this mine disposal discharge must comply with the effluent restrictions of § 301 and § 306, and that any permit allowing discharge must be issued by the Environmental Protection Agency. The district court held that the issuance of the permit was proper. We reverse and remand with instructions to vacate the permit.[2]

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[1] 33 U.S.C. §§ 1251-1387.

[2] We also vacate the permit granted to Goldbelt, Inc., to construct the Cascade Point Marine Facility in Berners Bay and the U.S. Forest Service's Record of Decision approving the general plan because they are dependent on the validity of the permit issued by the U.S. Army Corps of Engineers to Coeur Alaska.

I.

Coeur Alaska intends to open the Kensington Gold Mine on the site of a prior mine in southeast Alaska that operated from 1897 to 1928. Although the mining operation will include several above-ground facilities, the mine itself will be entirely subterranean.

To process the gold ore retrieved from the mine, Coeur Alaska will construct a froth-flotation mill facility. In the froth-flotation process, ore-bearing rock from the mine will be transported to a mill and moved through a series of mechanical crushing and grinding procedures. After the rock is finely ground, it will be fed into a tank where water and chemicals referred to as conditioners, frothers, surfactants, and scale inhibitors will be added. Air is then pumped into the tank, producing bubbles that attach to the gold deposits. The bubbles rise, bringing the gold with them and forming a froth that is skimmed off the top.

After the gold has bubbled up to the surface and the froth is removed, the tailings — residual ground rock — remain as a waste product. Of the 2,000 tons of ore that the Kensington mine will process each day, only about 100 tons (5 percent) contain economically viable gold minerals. About 40 percent of the tailings will be used as backfill in the mine. The remaining volume is, according to Coeur Alaska, too large to transport off site and presents a waste disposal problem. This dispute arises from Coeur Alaska's current plan for addressing that disposal problem.

Coeur Alaska's earlier plan of operations for the Kensington Gold Mine called for the construction of a "dry tailings facility," in which the mine would

dispose of waste from its froth-flotation mill on dry "uplands." This disposal process involved the construction of berm and drainage structures around the designated disposal area, dewatering the process wastewater, and placement of the tailings within an enclosure. After the closure of the mine in about 10 to 15 years, Coeur Alaska would have been required to cover the disposal area with native material to support revegetation. The U.S. Forest Service ("Forest Service") approved the plan of operations for the dry tailings facility, and the U.S. Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") issued permits to the company authorizing the construction of this facility in 1997. The price of gold subsequently dropped to $400 an ounce, however, prompting Coeur Alaska to investigate less expensive ways to develop the mine project.[3] In 2004, Coeur Alaska proposed a new plan of operations with significant amendments. The most important change for our purposes was that, instead of the dry tailings facility, Coeur Alaska proposed to discharge its process wastewater containing the tailings directly into nearby Lower Slate Lake.

Lower Slate Lake, a 23-acre subalpine lake in the Tongass National Forest, is one of several small lakes in the vicinity of the mine. The lake is a fish and wildlife habitat and supports about 1,000 Dolly Varden Char (a freshwater fish) and other native fish and aquatic life. The lake is also a tributary of Slate Creek and drains into Berners Bay.

Coeur Alaska's current disposal plan involves piping approximately 210,000 gallons of process

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[3] The price of gold has since been rising steadily and is currently over $680 an ounce, thus the original motivation for the change in waste disposal from the mine no longer exists.

wastewater, including 1,440 tons of tailings, each day to the bottom of Lower Slate Lake in the form of a slurry. This slurry would consist of about 45 percent water and 55 percent tailings. A polymer and flocculent would be added to the slurry to enhance settling of the tailings. Over the 10- to 15-year life of the mine, approximately 4.5 million tons of tailings would be deposited into the lake. The discharge ultimately would raise the bottom of the lake 50 feet, to its current high water mark, and nearly triple its surface area. Coeur Alaska and the Corps admit that the discharge and settling of the tailings into the lake would kill all the fish and nearly all the aquatic life. The effluent would have a pH factor of over 10, which is considerably higher than the lake's current pH factor, and would contain concentrations of several potentially hazardous materials, including aluminum, copper, lead, and mercury. The toxicity of the discharge may have lasting effects on the lake and may negatively affect its ability to sustain aquatic life in the future. The Corps intends that aquatic life would be reintroduced into the lake, but the extent to which aquatic life could be restored eventually is unclear.

To prepare the lake for use as a wastewater disposal facility and the consequent expansion of the lake's surface, Coeur Alaska would construct a 90-foot high, 500-foot long dam at the lake's outfall point. Coeur Alaska's long-term plan to use the lake as a disposal facility also includes the construction of a diversion ditch. Constructing the ditch would require cutting trees on 7.6 acres of forested land, building a 30-foot wide road, excavating and digging a 3,000-foot ditch, and filling in 4.3 acres of nearby wetlands with 28,800 cubic yards of fill material. In addition, during the 10- to 15-year period of the

lake's use as a disposal facility, Slate Creek would be diverted around the lake through a pipeline.

The Forest Service approved Coeur Alaska's current plan of operations at the Kensington Gold Mine, including the revised disposal plan, in a Record of Decision ("ROD") on December 9, 2004. Because the proposed discharge would have the effect of raising the bottom elevation of Lower Slate Lake, the Corps reasoned that the permit program under § 404 of the Clean Water Act, rather than § 402, applies to Coeur Alaska's planned discharges. Accordingly, the Corps issued a permit for the discharge into Lower Slate Lake on June 17, 2005.

Under the permit, when operations at the mine eventually cease, the Corps would require Coeur Alaska to mitigate the environmental impacts at the lake by installing a cap of native material over the tailings at the bottom of the lake. The Corps would also require Coeur Alaska to reintroduce native fish species into the lake and monitor the health of the ecosystem.

II.

Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") filed this lawsuit challenging the Corps' permit and the Forest Service's ROD approving the general plan on the grounds that they violate § 301(a), § 301(e), and § 306(e) of the Clean Water Act. The crux of SEACC's argument is that the Corps violated the Clean Water Act by issuing a permit for the discharge of process wastewater from a froth-flotation mill into a body of water protected by the Clean Water Act.

After the complaint was filed, the Corps decided to suspend the permit and reconsidered its decision to

issue the permit. For that purpose, the Corps moved for voluntary remand of the case before briefing on the merits began, which the district court granted on November 14, 2005. The Corps reinstated the original permit, without changes, on March 29, 2006. At the same time, the Corps issued a revised ROD in which it explained its rationale. SEACC then filed an amended complaint, in which it reiterated its allegations and reasserted its causes of action. Coeur Alaska, Goldbelt, Inc., and the State of Alaska intervened as defendants. The parties filed cross-motions for summary judgment.

The district court granted summary judgment to the defendants on August 4, 2006. In its opinion, the district court focused on whether the Corps misapplied § 404 of the Clean Water Act. The district court noted that SEACC challenged the granting of the permit on the grounds that it did not comply with § 301(e) and § 306(e). It held that if the permit was issued under § 404 for the disposal of "fill material," then § 301(e) and § 306(e) were inapplicable.

SEACC appealed on August 7, 2006, three days after the district court's decision, and this court, on SEACC's motion, granted an injunction pending appeal on August 24, 2006, which prohibited Coeur Alaska, the Corps, and the Forest Service from proceeding with further construction activities related to preparing the lake for use as a waste disposal site. *See SEACC v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1099 (9th Cir. 2006). Since granting the injunction, we have addressed two emergency motions related to stabilizing a temporary coffer dam that was hastily constructed by Coeur Alaska prior to the injunction. *Id.*; *SEACC v. U.S.*

*Army Corps of Eng'rs*, 479 F.3d 1148, 1151-52 (9th Cir. 2007).

III.

We review the district court's grant of summary judgment de novo and must determine whether the district court correctly applied the relevant substantive law. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003); *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). "De novo review of a district court judgment concerning a decision of an administrative agency means the court views the case from the same position as the district court." *Turtle Island*, 340 F.3d at 973 (citing *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). Judicial review of administrative decisions under the Clean Water Act is governed by § 706 of the Administrative Procedure Act ("APA"). *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). Under the APA, a court may set aside an agency action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Turtle Island*, 340 F.3d at 973.

IV.

Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern Coeur Alaska's proposed plan of operations at the Kensington Gold Mine, but they result in different interpretations of the Act. The discharge of wastewater containing tailings from Coeur Alaska's froth-flotation mill operation facially meets the Corps' current regulatory definition of "fill material" because it would have the effect of raising the bottom

elevation of the lake. *See* 33 C.F.R. § 323.2(e). Accordingly, under this interpretation, the discharge would be subject to the permit process governed by § 404 of the Clean Water Act. However, EPA previously promulgated a performance standard, pursuant to § 301 and § 306 of the Clean Water Act, that prohibits discharges from froth-flotation mills into waters of the United States. *See* 40 C.F.R. § 440.104(b)(1).

Both of the regulations appear to apply in this case, yet they are at odds. As explained below, the plain language of the Clean Water Act resolves this conflict and requires that the performance standard controls. The statute is unambiguous on this point, and the performance standard applies to discharges from the froth-flotation mill at Coeur Alaska's Kensington Gold Mine into Lower Slate Lake. Furthermore, the federal agencies' clear statements at the time they adopted the current regulatory definition of the term "fill material" demonstrate that they did not intend for waste products subject to effluent limitations and performance standards to be regulated as "fill material." For these reasons the Corps should not have issued a permit to Coeur Alaska under § 404. The district court's grant of summary judgment in favor of the Corps is reversed, and we remand for summary judgment to be entered in favor of the plaintiffs with directions to vacate the permit granted by the Corps.

A.

We begin, as we must, with the text of the Clean Water Act itself to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must

give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

1.

Congress passed the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States. 33 U.S.C. § 1251(a). To achieve this objective, the Clean Water Act sought to eliminate completely the discharge of all pollutants into the nation's navigable waters by 1985. 33 U.S.C. § 1251(a)(1). It also sought to make those waters suitable for fish, shellfish, wildlife, and recreation. 33 U.S.C. § 1251(a)(2). One of Congress's principal concerns in passing the Clean Water Act was the use of water for waste disposal, which Congress deemed "unacceptable." *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."), *quoted in Weyerhauser Co. v. Costle*, 590 F.2d 1011, 1043 (9th Cir. 1978).

[1] The "cornerstone" and "fundamental premise" of the Clean Water Act is § 301, which prohibits all discharges of any pollutant except in compliance with specified provisions of the statute. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). Specifically, § 301(a) provides that "the discharge of any pollutant by any person

shall be unlawful" except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404.[4] 33 U.S.C. § 1311(a). In furtherance of this mandate, § 301(b) requires EPA to adopt increasingly stringent, technology-based effluent limitations[5] for point sources.[6] Once an effluent limitation is promulgated, § 301(e) requires that it "shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of" the statute. 33 U.S.C. § 1311(e) (emphasis added).

[2] Similarly, § 306 requires EPA to implement even more stringent "standards of performance" for new sources such as the new Coeur Alaska mine project.[7] 33 U.S.C. §1316(b). To carry out § 306's

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[4] The full text of § 301 states: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[5] "The term 'effluent limitation' means any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, . . . including schedules of compliance." 33 U.S.C. § 1362(11).

[6] "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[7] "The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2). "The term 'source' means any building,

directive, EPA must promulgate a list of categories of sources and, for new sources within each category, establish a national standard of performance (also referred to as a New Source Performance Standard). *Id.* A standard of performance is defined as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting *no discharge* of pollutants." 33 U.S.C. § 1316(a)(1) (emphasis added). As with the effluent reductions promulgated under § 301,[8] § 306 states that, once a standard of performance takes effect, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). Congress thus "intended these regulations to be absolute prohibitions." *E.I. du Pont de Nemours & Co. v. Train ("Du Pont")*, 430 U.S. 112, 138 (1977) (citing S. Rep. No. 92-414, at 58 (1971)). The legislative history of § 306 indicates that Congress made a "deliberate choice not to allow variances for new sources." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192 (2d Cir. 2004). As such, no exceptions to a standard of performance are allowed. *See id.*; *Du Pont*, 430 U.S. at 138.

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structure, facility, or installation from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3).

[8] A standard of performance is one type of effluent limitation. *See* 33 U.S.C. § 1362(11). Therefore, § 301(e) and § 306(e) have the same practical effect in this case.

[3] To ensure compliance with effluent limitations and performance standards established pursuant to § 301 and § 306, Congress created the National Pollutant Discharge Elimination System ("NPDES") permit program under § 402 of the Act. Through the NPDES program, EPA may permit a discharge, but only if it complies with § 301 and § 306. Additionally, NPDES permits are supposed to limit the release of pollutants into waterways as much as possible by imposing numerical discharge restrictions. *Rybacheck v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990). For this reason, the NPDES permit program is considered "central to the enforcement" of the Clean Water Act. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977).

[4] In addition to the NPDES permit program, the Clean Water Act established a secondary permit program for the discharge of "dredged or fill material" under § 404. According to § 404, the Corps "may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). We conclude that the permit scheme under § 404 is a limited permit program that applies only to dredged or fill material, not to the discharge of pollutants from industrial or municipal sources.

2.

[5] The language of the Clean Water Act is clear on the issue at the center of this dispute. First, § 301(a) prohibits *any* discharge that does not comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404. 33 U.S.C. § 1311(a). The use of "and" as a connector, instead of "or," indicates that Congress intended for effluent limitations and standards of performance to apply to

all applicable discharges, even those that facially qualify for permitting under § 404. Second, § 301(e) applies effluent limitations established by EPA to *all* discharges. 33 U.S.C. § 1311(e). Third, § 306(e) prohibits *any* discharge that does not comply with performance standards promulgated by EPA. 33 U.S.C. § 1316(e). In clear and precise terms, § 301 and § 306 require that discharges comply with applicable effluent limitations and standards of performance. Neither § 301 nor § 306 contains an exception for discharges that would otherwise qualify for regulation under § 404. Rather, § 301 and § 306 are "absolute prohibitions" with no exceptions. *Du Pont*, 430 U.S. at 138.

[6] Nevertheless, the defendants argue that § 301 and § 306 do not apply to § 404 permits because § 402 explicitly requires compliance with those sections whereas § 404 does not. The defendants then reason, by way of negative inference, that § 404 contains an implied exception to the requirements of § 301 and § 306 whenever a proposed discharge would meet the agencies' regulatory definition of "fill material." We disagree. Negative inferences and implied exceptions are generally disfavored. As the Supreme Court stated in *United States v. Rutherford*, 442 U.S. 544 (1979): "Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Id.* at 552 (citing *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)). That is because courts have "generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1852 (2006) (quoting *Bates v. United*

*States*, 522 U.S. 23, 29-30 (1997)). The defendants have produced no compelling reason to believe that Congress intended an exception within § 404 that it did not explicitly create. If the defendants' interpretation were correct, Congress would have written § 301 and § 306 within § 402, not as separate sections. Moreover, the implied exception urged by the defendants, if adopted, would turn § 404 into an exception that swallows the rule created by § 301, § 306, and § 402 by allowing the Corps to use a negative inference from an exception clause within § 402. Thus, § 404's silence regarding the explicit and detailed requirements in § 301 and § 306 cannot create an exception to those sections' strongly-worded blanket prohibitions.

The defendants' interpretation would render § 301(e) and § 306(e) effectively meaningless. Courts strive to avoid interpreting a statute "in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991), *quoted in Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1024 (9th Cir. 2005); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). If the defendants were correct, the words "all" in § 301(e) and "any" in § 306(e)[9] would lose their meaning entirely.

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[9] Section 301(e) provides: "Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of this chapter." 33 U.S.C. § 1311(e) (emphasis added). Section 306(e), which applies to new sources like the Coeur Alaska mine project, provides: "After the

[7] There is a much simpler explanation for the difference in language between § 402 and § 404 than the defendants' proposed negative inference. If EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge. *See* 67 Fed. Reg. 31,129, 31,135 (May 9, 2002); EPA/Corps, Joint Response to Comments 12 (May 3, 2002). Accordingly, the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation under § 301 or a standard of performance under § 306. Consequently, there was simply no need for Congress to enumerate § 301 or § 306 within § 404 because Congress never intended for § 404 to govern discharges subject to effluent limitations or performance standards. Rather, when a discharge is subject to an effluent limitation or performance standard, that discharge must comply with the NPDES program as required by § 402. *See* 67 Fed. Reg. at 31,135; 47 Fed. Reg. 54,598, 54,606 (Dec. 12, 1982). This construction of the statute preserves the full meaning of all of its provisions without rendering any provision superfluous or resorting to negative inferences and implied exceptions.

Additionally, although § 404 does not contain an explicit exception to effluent limitations or standards of performance, it does contain exceptions to other provisions of the Clean Water Act. Specifically, § 404(f) exempts discharges of dredged or fill material

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effective date of standards of performance promulgated under this section, it shall be unlawful for *any* owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316 (emphasis added).

from certain activities from regulation under § 301(a), § 402, and § 404. 33 U.S.C. § 1344(f)(1). Discharges related to agricultural activities and road construction, among others, are exempted under § 404(f)(1). Mining is not listed as an exempt activity. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). The defendants have produced no reason to believe that Congress intended additional exemptions to be created later. Therefore, the lack of any explicit exception to § 301 and § 306 within § 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not intend one. *Id.* Even stronger evidence is Congress's insistence in § 404(f) that even the discharges from the enumerated activities continue to be subject to effluent standards. 33 U.S.C. § 1344(f).

[8] Thus, the plain language of the Clean Water Act directly resolves the conflict between the regulatory definition of "fill material" and EPA's performance standard for froth-flotation mill operations. Pursuant to § 301 and § 306, EPA's performance standard for froth-flotation mills governs this situation. The language of § 404 does not lead to a contrary conclusion.

B.

Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of "fill material" to replace the performance standard for

froth-flotation mills. Courts consider contemporaneous explanations of regulations, such as those published in the Federal Register through notice-and-comment rulemaking, in order to determine an agency's intent. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 797 (9th Cir. 2003); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189-90 (9th Cir. 2002); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 446-47 (4th Cir. 2003). And courts will not defer to an agency's interpretation of a regulation that contradicts the agency's intent at the time it promulgated the regulation. *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 916 (2006); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627-28 (9th Cir. 2005); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of a regulation is not entitled to deference where it is "plainly erroneous" or "inconsistent with the regulation") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). When the agencies promulgated the current definition in 2002, they foresaw and specifically addressed the potential conflict between the effects-based definition of "fill material" and performance standards already in place. To that end, the agencies explicitly stated that wastes subject to performance standards and effluent limitations would not be considered "fill material." The Corps' application of the fill rule in this case, therefore, contradicts its interpretation at the time the regulation was promulgated.

1.

Following its statutory obligation under § 301 and § 306, in 1982 EPA promulgated effluent limitations and standards of performance for sources within the category of ore mining. *See* 47 Fed. Reg. 25,682 (June 14, 1982) (proposed); 47 Fed. Reg. 54,598 (Dec. 3, 1982) (final). Within this category, EPA established a subcategory that applied to gold mining. *See* 40 C.F.R. §§ 440.100-440.104. For gold mines using the froth-flotation mill process, EPA promulgated a zero-discharge standard:

> Except as provided in paragraph (b)[2] of this section, there shall be *no discharge* of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores.

40 C.F.R. § 440.104(b)(1) (emphasis added); *see also* 47 Fed. Reg. at 25,697 (proposing zero discharge). EPA found that the zero-discharge standard was practicable because the majority of facilities existing at the time already achieved zero discharge through recycling and evaporation processes. 47 Fed. Reg. at 54,602. EPA promulgated this standard knowing that process wastewater discharges from froth-flotation mills contain a large amount of suspended solids that could otherwise qualify for regulation under § 404 pursuant to its effects-based definition of "fill material." *See* 47 Fed. Reg. at 25,685 ("Mill process wastewater is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter) . . . ."). In determining that a strict zero-discharge limit was

appropriate, EPA determined that the best available control technology included the complete recycling of process wastewater. *See* 47 Fed. Reg. at 54,602. Given that the regulation facially applies to *any* discharge from a froth-flotation mill, and that it provides some limited exceptions that do not include "fill material," EPA intended for the prohibition to apply to discharges that would otherwise qualify as fill material under § 404. *See* 67 Fed. Reg. at 31,135. This conclusion is also supported by the fact that EPA promulgated the regulation notwithstanding its definition of "fill material," which was identical to the definition used by both agencies today.

2.

[9] The history of the current fill rule also demonstrates that both agencies intended for effluent limitations and performance standards to apply even to discharges that facially meet the definition of the term "fill material." The Clean Water Act does not define the term "fill material." Instead, Congress implicitly left that term to the Corps and EPA to define. *See Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1166 (9th Cir. 1998). As with most regulatory definitions, the agencies' definitions of "fill material" have evolved over time. In fact, prior to the current regulatory definition of "fill material," the Corps and EPA defined "fill material" differently. The Corps initially used an effects-based test, which defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31,320, 31,325 (July 25, 1975). EPA later adopted the identical definition. 40 Fed. Reg. 41,292, 41,298

(Sept. 5, 1975). Two years later, the Corps revised its definition and adopted a purpose-based test, which excluded from its definition "any pollutant discharged into the water primarily to dispose of waste." 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). In adopting its purpose-based definition, the Corps explained that there were many waste materials "which technically fit within our definition of 'fill material' but which were intended to be regulated under the NPDES program." *Id.* at 37,130. EPA, in 1980, chose to keep its effects-based test. *See* 45 Fed. Reg. 33,290, 33,421 (May 19, 1980).

The agencies' differing definitions of "fill material" created a potential regulatory overlap. *See, e.g., Res. Invs.*, 151 F.3d at 1165-66, 1168-69 (acknowledging overlap); *Kentuckians*, 317 F.3d at 432 ("the Corps acknowledged that the differing approaches in defining 'fill material' employed by EPA and the Corps in their regulations had created some uncertainty about their interpretation of the Clean Water Act"). Many industrial wastes contain a high proportion of suspended solids and, therefore, have the effect of changing the bottom elevation of a body of water. As such, those wastes could have been considered fill material under EPA's definition. However, EPA continued to regulate many of those industrial wastes under § 402, and also continued to promulgate new effluent limitations and standards of performance for industrial pollutants with high concentrations of solids, regardless of their potential to raise the bottom elevation of a body of water. *See, e.g.*, 46 Fed. Reg. 8,260, 8,292 (Jan. 26, 1981) (regulating discharges of suspended solids from log-washing processes). Indeed, the new source performance standard for froth-flotation mills was adopted in 1982, despite the fact that waste from this

process would have the effect of raising bottom elevation and, therefore, could otherwise constitute fill material under EPA's effects-based test. *See* 47 Fed. Reg. at 25,685. Thus, notwithstanding the potential regulatory overlap created by the agencies' differing definitions, EPA regulated many industrial pollutants under § 402. The agencies formally adopted this practice in a Memorandum of Agreement on Solid Waste ("MOA") in 1986. 51 Fed. Reg. 8,871 (Mar. 14, 1986). After adoption of the MOA in 1986, the Corps continually declined to exercise jurisdiction over mine tailings.[10]

In 2002, the agencies promulgated their joint regulation defining the terms "fill material" and "discharge of fill material." 67 Fed. Reg. at 31,130. The current regulatory definition of "fill material" provides:

> (1) Except as specified in paragraph (e)(3) of this section, the term "fill material" means material placed in waters of the United States where the material has the effect of:
>
> > (i) Replacing any portion of a water of the United States with dry land; or

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[10] *See, e.g.*, Memorandum from Col. John W. Pierce, U.S. Army Corps of Eng'rs, "Agency Jurisdiction over Certain Activities Connected with Mineral Extraction, Specifically Gold Mining, in Alaska" 1-2 (Apr. 14, 1992) ("The tailings behind the dam, however, are a waste product of the mining operation and are not under our jurisdiction according to the 1986 Memorandum of Agreement . . . ."); Letter from Glen E. Justis, U.S. Army Corps of Eng'rs 2-3 (June 18, 1991) ("The Corps has neither special expertise [n]or jurisdiction by law to evaluate the impacts of the tailings discharge. . . . The tailings do not meet the Corps' definition of fill material.").

> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining[11] or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

33 C.F.R. § 323.2(e) (Corps' regulation); 40 C.F.R. § 232.2 (EPA's regulation) (emphasis added). The agencies also defined "discharge of fill material" as follows:

> The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: . . . placement of overburden, slurry, or tailings or similar mining-related materials . . . .

33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.[12]

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[11] "Overburden" is generally defined as rock or soil cleared away before mining. *See* EPA, *Terms of Environment*, http://www.epa.gov/ OCEPAterms/oterms.html (May 14, 2007).

[12] The *amici* brief of 14 members of Congress argues persuasively that the adoption of these regulations by the Corps and EPA violates the purposes and plain language of the Clean Water Act by allowing waste material to be dumped into lakes, rivers, and other waters of the United States. SEACC bases its argument on a narrower ground pertaining to this particular mine. Thus, we do not reach the issue of the validity of these regulations.

At the same time, however, the agencies made clear that they did not intend to change their long-standing practice, according to which EPA regulates discharges of pollutants for which it has established effluent limitations or standards of performance under the NPDES program.[13]

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304[14] and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never

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[13] In *Kentuckians*, the Fourth Circuit recognized the Corps' prior practice of not regulating discharges subject to effluent limitations under § 404:

> [W]e conclude that the Corps' interpretation of "fill material" as used in § 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body *except* for "waste" — meaning garbage, sewage, and *effluent that could be regulated by ongoing effluent limitations* as described in § 402 — is a permissible construction of § 404.

317 F.3d at 448. The court also explained the Corps' prior position that it was not authorized to regulate discharges subject to effluent limitations. *Id.* at 445.

[14] Sections 304 and 301 are interchangeable in this instance. Section 304 directs EPA in how to determine the degree of effluent reduction attainable under § 301. *Citizens Coal Council v. EPA*, 447 F.3d 879, 883 (6th Cir. 2006) (en banc) (citing 33 U.S.C. § 1314).

> sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA*. Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

67 Fed. Reg. at 31,135 (emphasis added). Additionally, in their Joint Response to Comments to the proposed rule, the agencies restated this position:

> Under today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or a NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.

EPA/Corps, Joint Response to Comments 30. In the same document, the agencies clarified that the new

rule would not expand the jurisdiction of the Corps or permit previously prohibited discharges: "the suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case — no discharges that were previously prohibited are now authorized as a result of this rulemaking." *Id.* Thus, the agencies clearly intended to exclude discharges subject to effluent limitations or performance standards from the new definition of "fill material."

In fact, when the Corps and EPA first proposed the revised, coordinated definition in 2000, they included an explicit exemption from the definition of "fill material" for discharges subject to effluent limitations or standards of performance. *See* 65 Fed. Reg. 21,292, 21,299 (Apr. 20, 2000). The stated purpose of the exemption was to maintain the agencies' "current practice," which was "consistent with paragraph B.5 of the 1986 Solid Waste MOA." *Id.* at 21,297. Although the agencies removed the explicit exemption from the final rule, they did so only because commenters expressed concern that the exception was vague and would create uncertainty regarding whether the reference to effluent guidelines applied prospectively or only to those guidelines already in existence at the time. *See* 67 Fed. Reg. at 31,135. As such, the agencies still intended to regulate discharges subject to effluent limitations and standards of performance under § 402.

The defendants attempt to undermine the clear intent of the agencies by focusing on a single sentence of the preamble in which the agencies stated "mining-related material that has the effect of fill when discharged will be regulated as 'fill

material.' " *Id.* The district court also relied on that one sentence. However, the defendants and the district court give far more weight to that singular statement than it deserves. It is difficult to understand why the agencies would painstakingly explain in the preamble that the new definition would not change their treatment of discharges subject to effluent limitations and standards of performance, only to completely contradict themselves two paragraphs later. The agencies themselves cleared up any potential confusion in their Joint Response to Comments:

> Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. *Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid.*

EPA/Corps, Joint Response to Comments 12. Thus, the current fill rule only applies to those tailings and other mining related materials that are not subject to effluent limitations or standards of performance.[15]

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[15] The Fourth Circuit's holding in *Kentuckians* is consistent with our conclusion. In *Kentuckians*, the court addressed the issue of whether the Corps had authority under § 404 to permit valley fills from mountain-top coal mining "when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity." 317 F.3d at 439. EPA had not promulgated a performance standard for mountain-top coal mining, so neither § 301 nor § 306 was implicated in that case. *Id.* at 445. Moreover, in that case, the Corps admitted that, under the 2002 definition, "it was authorized to regulate discharges of fill, even for waste, *unless the fill amounted to*

The agencies could not have been more clear in articulating that this would be their preferred approach.

3.

[10] In fact, the agencies followed that approach with Coeur Alaska for quite some time. The Corps consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404. At least, the agencies took that approach up until the time that the Corps granted the permit that led to this dispute. Prior to the promulgation of the current fill rule in 2002, the Corps relied on the 1986 MOA in informing Coeur Alaska that it lacked jurisdiction and expertise to permit discharges of tailings from the Kensington mine as "fill material." For example, in a 1998 ROD, the Corps made clear to Coeur Alaska that it "does not regulate the placement of tailings." U.S. Army Corps of Eng'rs, ROD 13 (Jan. 18, 1998). And as late as 2005, EPA informed Coeur Alaska that "[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project." EPA, ROD for § 402 NPDES Permit 3 (June 28, 2005) (citing 40 C.F.R. § 440.104). Therefore, in addition to the regulatory history, the agencies have an established record of refusing to regulate tailings discharged from Coeur Alaska's planned froth-flotation mill at the Kensington mine as fill material under § 404.

C.

The agencies' unequivocal statements regarding their intent not to override effluent limitations and

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*effluent that could be subjected to effluent limitations.*" *Id.* (emphasis added).

standards of performance when they promulgated the current fill rule are dispositive and compel the conclusion that the Corps overstepped its authority in issuing a permit to Coeur Alaska under § 404. If the agencies actually did intend to repeal or create an exception to the performance standard for froth-flotation mills when they promulgated the current fill rule, they did not acknowledge or provide a satisfactory explanation for the change in course. When an agency decides to change course by rescinding or changing a rule, the agency "is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). If an agency fails to comply with that obligation, the new rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is invalid under § 706(2)(A) of the APA. *Id.* at 41 (citing 5 U.S.C. § 706(2)(A)); *see also Bush-Quayle '92 Primary Comm., Inc. v. Fed. Election Comm'n*, 104 F.3d 448, 453 (D.C. Cir. 1997). Not only did the Corps and EPA not acknowledge a change in course when they promulgated the fill rule, they actually stated the opposite intent. That is, the agencies made clear that effluent limitations and standards of performance would continue to apply. We could not have interpreted the fill rule as creating an exception to the performance standard for froth-flotation mills without the agencies complying with the APA by explaining their intent in the Federal Register and offering an opportunity for notice and comment. *See Motor Vehicle Mfrs.*, 463 U.S. at 42.

D.

Finally, the performance standard governs because it is more specific. It is a basic principle of regulatory interpretation that a regulation dealing with a "narrow, precise, and specific subject is not submerged" by a later enacted regulation "covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), *cited in Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000). Unlike the fill rule, which pertains to fill material generally, the performance standard covers froth-flotation mills precisely. *See* 40 C.F.R. § 440.104. Consequently, the agencies' later promulgation of the more general fill rule cannot supersede the narrow, precise, and specific performance standard for froth-flotation mills.

E.

The Corps also issued a permit to Goldbelt, Inc., for construction of a marine terminal facility at Cascade Point and issued a ROD approving Goldbelt's plan of operations. *See* U.S. Army Corps of Eng'rs, Permit to Goldbelt, Inc. (July 15, 2005); U.S. Army Corps of Eng'rs, Revised ROD 4 (Mar. 29, 2006). Goldbelt's permit and ROD are predicated on a mine design of which a critical component is Coeur Alaska's discharge of process wastewater into Lower Slate Lake. But for that mine design, the Cascade Point facility would be unnecessary. In fact, the Corps itself stated that "without Kensington mine, the Cascade Point facility would not be constructed in the foreseeable future." U.S. Army Corps of Eng'rs, Revised ROD 4. For that reason, the Corps considered the terminal a "component" of the Kensington project and analyzed the terminal

proposal in the same Final Supplemental Environmental Impact Statement and Revised ROD as the Kensington project. *Id.* Indeed, Goldbelt must have had a "significantly protectable interest" relating to the subject of this case in order to intervene as a defendant, which it chose to do. *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002); Fed. R. Civ. P. 24(a)(2). Importantly, in its motion to intervene, the company admitted that "Goldbelt's Cascade Point marine terminal is an integral part of the approved Plan of Operations, and may be constructed and used *solely* to service the Kensington Mine as contemplated in that Plan of Operations." Goldbelt further admitted that "[a]ny ruling by this Court that delays or disrupts construction of the mine will leave Goldbelt with a 'permitted' facility that either it cannot build or cannot be operated once built because the condition precedent of Goldbelt's permits is construction and operation of the Kensington Mine as contemplated in the challenged Plan of Operations." Consequently, Goldbelt's permit and ROD are critically premised on Coeur Alaska's § 404 permit. Because that permit is invalid, the Corps' permit and ROD for the Cascade Point facility should be vacated.

F.

[11] Under the APA, the normal remedy for an unlawful agency action is to "set aside" the action. 5 U.S.C. § 706(2). In other words, a court should "vacate the agency's action and remand to the agency to act in compliance with its statutory obligations." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *cert. granted*, 127 S. Ct. 853 (2007); *see also Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). For the reasons discussed

above, the Corps' permit for the discharge of process wastewater from the froth-flotation mill at the Kensington Gold Mine into Lower Slate Lake violates § 301 and § 306 of the Clean Water Act. The Corps' permit for construction of a marine terminal at Cascade Point critically depends on the unlawful permit to Coeur Alaska. Consequently, we remand to the district court to vacate both permits, as well as the RODs on which they are based.

V.

In conclusion, we reverse the district court, remand to the district court to vacate the permits issued to Coeur Alaska and Goldbelt, and vacate the RODs that approved Coeur Alaska's and Goldbelt's plans of operations. The Corps violated the Clean Water Act by issuing a permit to Coeur Alaska for discharges of slurry from the froth-flotation mill at the Kensington Gold Mine. EPA's performance standard for froth-flotation mills, promulgated pursuant to § 301 and § 306 of the Clean Water Act, prohibits discharges from such operations into the navigable waters of the United States. No exceptions are provided by either the regulation or the statute. Even though the discharge in this case facially qualifies for the permitting scheme under § 404 of the Clean Water Act because it will change the bottom elevation of Lower Slate Lake, the discharge is nevertheless prohibited by the clearly applicable and specific performance standard. The plain language and structure of the Clean Water Act demonstrate that EPA's performance standard governs in this case. Also, the agencies' statements made during promulgation of the regulation defining "fill material," as well as their statements made to Coeur Alaska during the lengthy permitting process,

indicate that they intended this result. Thus, the district court erred in granting summary judgment in favor of the defendants. The case is remanded to the district court for action pursuant to this opinion.

**REVERSED and REMANDED.**

**APPENDIX B**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF ALASKA**

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; and LYNN CANAL CONSERVATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL TIMOTHY J. GALLAGHER, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity as Chief of the Regulatory Branch; JOHN C. LEEDS, III, in his capacity as manager of the Juneau Field Office; GLEN E. JUSTIS, in his official capacity as Chief of the East Section; DOMINIC IZZO, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); and UNITED STATES FOREST SERVICE,

Defendants,

and

COEUR ALASKA, INC.; STATE OF ALASKA; and GOLDBELT, INC.,

Defendant-Interveners.

No. 1:05-cv-00012-JKS

**MEMORANDUM DECISION**

[Re: Motions at Dockets 41 and 80]

## I. PROCEEDINGS

Plaintiffs Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation appeal the decision of the U.S. Army Corps of Engineers ("Corps") decision to grant permits to Coeur Alaska, Inc. and Goldbelt, Inc, under § 404 of the Clean Water Act ("CWA").[1] Plaintiffs seek to vacate the § 404 permits, Record of Decision and plan of operations, and permanently enjoin the Corps and Forest Service from allowing any activities authorized by the vacated permits, ROD, and plan of operations. At Docket No. 41 Plaintiffs have moved for summary judgment. At Docket No. 80 the Federal Defendants have opposed the motion and cross-moved for summary judgment in their favor.[2] At Docket Nos. 61, 67, and 71, respectively, Interveners Goldbelt, Inc., State of Alaska, and Coeur Alaska, Inc. have filed oppositions to Plaintiffs' motion. City and Borough of Juneau and Berners Bay Consortium have filed amici briefs in opposition to Plaintiffs' Motion at Docket Nos. 88 and 92, respectively. At Docket No. 97 Southeast Conference has filed an amicus brief in support of the Plaintiffs' motion. Plaintiffs have replied to the opposition.

At Docket Nos. 83 and 86 Intervener Coeur Alaska and the Federal Defendants have requested oral argument. The Court having reviewed the moving papers, oppositions, and amici briefs has determined that oral argument would not assist the court in deciding the motions. The requests for oral argument are DENIED.

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[1] 33 U.S.C. § 1344.

[2] For convenience, the named defendants are referred to collectively as "Federal Defendants."

## II. BACKGROUND[3]

The permit granted Coeur Alaska allows it, as the operator of the Kensington Mine, to discharge approximately 210,000 gallons per day of tailings remaining after gold ore is processed using the "froth-flotation process" as "fill material" directly into Lower Slate Lake. The lake will be utilized as a storage facility impounding the tailings.[4]

After the ore is extracted from the ground, it will be processed through crushing, grinding, flotation, thickening and filtration.[5] After the ore is crushed and ground, it is fed to the flotation tanks in slurry form, where air, conditioners and frothing agents will be added to cause the gold-bearing minerals to attach to air bubbles at the top of the tank.[6] The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks.[7] Most of the chemicals added to the system will stay in the flotation tanks or be removed with the flotation concentrate, not discharged with the tailings.[8] Similarly, most of the other metals will be removed from the system along with the gold concentrate, not discharged with the tailings.[9] Following the final

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[3] The background and history of this case are well known to the parties and, in the interests of brevity, will not be replicated here except as necessary to an understanding of the Court's decision.

[4] Agency Record ("AR"), Vol. 8, 003328.

[5] AR Vol. 8, 003360–61; *see also* Vol. 1, 000021.

[6] AR Vol 8, 003360-61.

[7] *Id.*

[8] *Id.*

[9] *Id.*; *see also* AR Vol. 1, 000005.

flotation, the ore concentrate is dewatered and placed in specialized, sealed marine transport containers for shipment to a facility outside Southeast Alaska for further processing. [10] No cyanide processing will take place at the Kensington Mine or elsewhere in Southeast Alaska.[11]

"Tailings" are the solid material left in the bottom of the flotation tanks after the gold-bearing material has been removed. [12] Using "high-grade" mine operations, approximately 40% of the tailings should be backfilled to the mine, leaving approximately 4.5 million tons of tailings to be discharged into the Lower Slate Lake impoundment.[13] The tailings will be combined with liquid in a slurry and transported through a 3.5 mile, double-walled, high-density polyethylene pipeline approximately 6 inches in diameter to the lake impoundment. [14] The solid component of the slurry (*i.e.*, the tailings) will comprise approximately 55% of the slurry. Before the tailings slurry leave the mill, a polymer and flocculant will be added to agglomerate the smaller tailings and enhance settling of the tailings once they are deposited into the lake impoundment.[15] The tailings slurry is to be discharged from the bottom of the submerged pipe and through perforations in that pipe, which will be moved periodically to ensure

[10] AR Vol. 1, 000005; Vol. 8, 003360–61.

[11] AR Vol. 1, 000005, 000021.

[12] AR Vol. 8, 003362.

[13] AR Vol 1, 000007; Vol. 8, 003358, 003362, 003367.

[14] AR Vol. 8, 003364.

[15] *Id.* The added materials are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material.

equal distribution of the tailings.[16] The tailings will be placed at a depth that would prevent remobilization of the tailings.[17] Upon closure of the mine, the tailings will fill the lake to its current ordinary high water mark, thus reaching a depth of approximately 50 feet.[18] At that time, the lake will have grown to approximately 62 acres from its current size of 23 acres, and will be approximately 33 feet deep over the top of the tailings.[19] The discharge of tailings to the lake impoundment is limited to the pre-specified volume of 4.5 million tons.[20] The tailings must also be tested quarterly tc ensure that there are no significant deviations from the original tailings analysis that might affect monitoring, closure requirements, water quality or any other permit condition.[21]

It is anticipated that most aquatic life in Lower Slate Lake will be lost during mining operations, primarily due to being covered with the discharged material.[22] Tests on the tailings show that they will not generate an acid discharge or metals leachate.[23]

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[16] *Id.*

[17] AR Vol 1, 000022.

[18] AR Vol 1, 000013; Vol. 8, 003453.

[19] AR Vol. 1, 000013. The increased lake area at closure is expected to consist of approximately 47 acres of deepwater habitat and 15 acres of shallow-water habitat. The 15 acres of shallow-water habitat is expected to convert over time to wetlands or vegetated shallows.

[20] *See* AR Vol 1, 000068, Vol. 13, 006285.

[21] AR Vol. 1, 000022, 000067–68.

[22] AR Vol. 1, 000021–22; Vol. 8, 003575.

[23] AR Vol. 1, 000030.

While the pH around the discharge pipe is expected to be toxic to the aquatic environment, it is anticipated this will dissipate very rapidly. [24] Reclamation of the 62-acre lake, including capping of the tailings, is required as part of the project.[25] As a result, it is expected that the lake would recover over time, and would provide at least equivalent aquatic habitat and productivity as it does currently.[26] This includes habitat for Dolly Varden char and other aquatic organisms.[27]

Mid-Lake East Fork Slate Creek, an upstream tributary of Lower Slate Lake, will be diverted around the lake impoundment by a pipeline. [28] Further, a "reverse osmosis" water treatment system will be constructed to remove solids and metals from the lake impoundment water before any of that water is allowed to enter downstream waters.[29] The treated water will be transported from the treatment plant to the diversion pipeline, and then flow via a spillway to East Fork Slate Creek, downstream of the lake, eventually joining Slate Creek and entering Berners Bay.[30] Discharges of the treated water from Lower Slate Lake are subject to a CWA § 402

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[24] AR Vol. 1, 000022.

[25] AR Vol. 1, 000013, 000015, 000022–23. A reclamation bond on the operation is being held to ensure that the lake is reclaimed in accordance with the approved plans. *See* AR Vol. 1, 000005.

[26] AR Vol. 1, 000022–23; Vol. 8, 003573–76.

[27] AR Vol. 1, 000022-23, 000069; Vol. 8, 003573-76.

[28] AR Vol. 8, 003367.

[29] AR Vol. 1, 000015; Vol. 8, 003367.

[30] *Id.*

NPDES permit and must meet state water quality standards.[31]

The overall impact of the project permitted by the Corps and EPA is to convert Lower Slate Lake into a temporary settling pond for the disposal and treatment of the tailings generated by the mining operations at the Kensington Mine. Broadly stated, the project entails; (1) isolating Lower Slate Lake from the rest of the drainage system, (2) using the lake as a tailing storage facility impounding the tailings, and (3) restricting the release of water into the downstream drainage system to that which meets the requirements of § 402. The adverse impact, primarily the destruction of aquatic life, is expected to be limited to Lower Slate Lake. At the termination of the mining operations, restoration of the lake as an aquatic resource is expected to occur.

III. ISSUES

Plaintiffs contend that the permitting process involved in this case was governed by the more stringent requirements of § 402 of the CWA,[32] not § 404. At the heart of the controversy are the regulations defining "fill material." The Environmental Protection Agency ("EPA") and the Corps use the same definition.[33]

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[31] AR Vol. 1, 000005. The State agreed in its CWA § 401 certification that the water discharged from the tailings disposal facility (Lower Slate Lake) to East Fork Slate Creek, which was permitted under a CWA § 402 NPDES permit, would meet state water quality standards. AR Vol. 2, 001101. Plaintiffs do not challenge the issuance of this permit.

[32] 33 U.S.C. § 1342.

[33] 33 C.F.R. § 323.2(e) (Corps); 40 C.F.R. § 232.2 (EPA). [Note: The quoted provision is the Corps' regulation; the

> (e) (1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

Also relevant is the definition of "discharge of fill material," defined as:[34]

> (f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for

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definition in the EPA regulations is identical except that the definitions are not set forth in separate subdivisions.]

[34] 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA) (emphasis added).

> recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement of overburden, slurry, or tailings or similar mining-related materials*; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See §323.4 for the definition of these terms). See §323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

Plaintiffs contends that either: (1) in issuing the permit, the Corps misapplied the regulations; or (2) if the regulations were properly applied, the regulations are invalid as contrary to the CWA.[35] The real crux of the question before this Court is:

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[35] The Court notes that Plaintiffs also challenges the granting of the permit on the grounds that it does not meet the requirements of the several sections of the CWA, *e.g.*, §§ 306(e) and 311(e). This argument must be rejected. If the permit was properly issued under § 404, those provisions of the CWA are inapplicable. The applicable standard to be applied are the guidelines promulgated by the EPA based on criteria specified in 33 U.S.C. § 1343(c). *See also* 33 C.F.R. 323.6(a). If the permit was not properly issued under § 404 it is invalid in any event and the argument of Plaintiffs moot.

Under § 404, may the Corps authorize the use of waters of the United States as a settling pond? For the reasons stated below, the Court holds that it may.

## IV. STANDARD OF REVIEW

This Court in reviewing an agency decision may set it aside if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] It is self-evident that an agency decision based upon an invalid regulation or the misapplication of a regulation is "otherwise not in accordance with law."[37]

In determining the validity of agency regulations, this Court must apply the rule established by the U.S. Supreme Court in *Chevron*.[38]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. * * * * [I]f the statute is silent or ambiguous with respect to

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[36] 5 U.S.C. § 706(2)(A).

[37] *See, e.g., Regents of the Univ. of California v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (invalid regulation), *overruled on other grounds by Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *Alaskan Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627–628 (9th Cir. 2005) (agency interpretation of its own regulations)

[38] *Chevron v. NRDC*, 467 U.S. 837, 842–843 (1984) (footnote omitted)

> the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The Supreme Court has, however, placed a limitation on the application of *Chevron*.[39]

> Deference in accordance with *Chevron*, however, is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Otherwise, the interpretation is entitled to respect only to the extent it has the power to persuade.

When reviewing the interpretation of agency regulations, courts must give substantial deference to an agency's interpretation of its own regulations.[40] This Court "must defer to the [Administrator's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [Administrator's] intent at the time of the regulation's promulgation."[41]

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[39] *Gonzales v. Oregon*, 546 U.S. ___, ___, 126 S. Ct. 904, 914–915 (2006) (citations and internal quotation marks omitted).

[40] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted).

[41] *Id.* (internal quotation marks and citation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (citations and internal quotation marks omitted); *Wards Cove Packing Co. v. NMFS*, 307 F.3d 1214, 1218 (9th Cir. 2002) ("An agency's interpretation of regulations it is charged with administering is entitled to a high degree of deference and will

## V. DISCUSSION

The CWA divides the permitting process into two segments. In general, permitting for the discharge of effluents is vested in the EPA, the granting of which must meet strict standards.[42] Congress has, however, carved out an exception, vesting primary permitting authority in the Corps for the disposal of "dredged or fill material" into navigable waters at specified disposal sites.[43] The standards to be applied for the issuance of these permits is determined in accordance with guidelines developed by the EPA in conjunction with the Corps, and are significantly less stringent.[44]

Turning first to the issue of the validity of the regulation. Congress has clearly and unequivocally delegated authority to the EPA to issue regulations necessary to carry out its functions under the CWA.[45] As noted above, one of the functions of the EPA is to develop guidelines, in conjunction with the Corps, for use in guiding the Corps in processing permits under § 404.[46] In the case at bar, it is undisputed that Congress has not defined the term "fill material,"

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be upheld as long as it is not plainly erroneous or inconsistent with the regulation.") (citations omitted).

[42] 33 U.S.C. § 1342(a).

[43] 33 U.S.C. § 1344(a).

[44] 33 U.S.C. §§ 1344(b)(1), 1343(c). The guidelines are promulgated in 33 C.F.R. Part 230. Plaintiffs do not contends that the permit issued to Coeur Alaska does not meet these guidelines.

[45] 33 U.S.C. § 1361(a) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.").

[46] 33 U.S.C. § 1344(b)(1).

thereby leaving its definition to the EPA, which the EPA did using the rule-making process of the Administrative Procedures Act. Accordingly, this Court must give *Chevron*-type deference to the EPA's definition of "fill material" and "discharge of fill material."[47]

Plaintiffs argue that the regulations are invalid because they do not comply with the "expressed intent of Congress." Specifically, that because they do not comply with standards promulgated by the EPA, they are contrary to § 306(e) of the CWA.[48] Plaintiffs' argument on this point is not persuasive. Plaintiffs do not specify which standard of performance is violated by these regulations, which simply define what constitutes fill material within the scope of § 404. This Court cannot say that the definition of fill material contained in the regulations promulgated by the EPA and Corps is not a permissible construction of the statute. the Agency could reasonably conclude that its definition is consistent with the distinction Congress sought to make between § 402 and § 404.

Turning to the interpretation of the regulation and its application in this case. First, the Court notes that it is uncontested that the slurry to be discharged into Lower Slate Lake will "change the bottom elevation" of the lake. Thus, it at least facially falls within the definition of "fill material"

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[47] *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 916, 921 (9th Cir. 2003).

[48] 33 U.S.C. § 1316(c) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.").

contained in the regulations. Plaintiffs do not dispute this. Plaintiffs argue that the inclusion of mine tailings within the definition of "fill material" is contrary to the agencies' intent at the time the regulations were promulgated. Plaintiffs' argument is essentially predicated upon the point that at the time the regulations were amended in 2002, the statement accompanying the notice of adoption of the final rule made clear that there was no intent to include mine tailings as "fill material" or "discharge of fill material."[49] The provisions cited by Plaintiffs taken alone and in isolation would support a finding of a clear indication by the EPA and Corps that the interpretation advanced by Plaintiffs is correct. However, Plaintiffs overlook or ignore other statements included in the adoption statement that contradict Plaintiffs' position. Specifically:

> Today's final rule also includes several clarifying changes to the term "discharge of fill material." Specifically, the term "infrastructure" has been added in several places following the term "structure" to further define the situations where the placement of fill material is considered a "discharge of fill material." In addition, the phrases "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills" and "*placement of overburden, slurry, or tailings or similar mining-related materials*" have been added to the definition of "discharge of fill material" *to*

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[49] Quoting various excerpts from 67 Fed. Reg. 31,129 – 31,143 (May 9, 2002).

> *provide further clarification of the types of activities regulated under section 404.*[50]

and,

> The language in today's final rule will clarify that any mining-related material that has the effect of fill when discharged will be regulated as "fill material." We made this clarification because it was clear from the comments that some were reading the examples we identified as an exclusive list. The general intent of this rule is to cover materials that have the effect of fill, not simply to focus on any one industrial activity. We believe that the additional mining related examples will address the confusion reflected in the comments. Finally, as discussed in section II.B.1.c of this preamble, we do not agree that the CWA contains a blanket prohibition precluding discharges of "waste" materials in to waters of the U.S. Instead, the Act establishes the framework for regulating discharges into waters and we believe the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials.[51]

Contrary to the arguments of Plaintiffs, the interpretation of the regulations in this case is not contrary to the intent of the EPA Administrator at the time she adopted the regulations in question. While Plaintiffs may offer another plausible interpretation of the regulations in question, that interpretation is not the only reasonable

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[50] *Id.*, 31,130 (emphasis added).

[51] *Id.*, 31,135 (emphasis added)

interpretation of the regulation and does not compel this court to strike down the Corps' different interpretation.[52] Congress has deemed it appropriate to delegate to the Administrator of Environmental Protection Agency and the Secretary of the Army to coordinate their respective jurisdictions under the Clean Water Act. This they have done by duly adopted regulations to which this Court must defer. The Corps properly issued the permit to Coeur Alaska, Inc. under § 404 of the Clean Water Act.

Plaintiffs also seek to set aside the permit issued to Goldbelt, Inc. to construct a marine terminal facility. As a basis for this action, Plaintiffs rely on the assumption that Coeur Alaska's § 404 permit will be revoked and, therefore, the need for the marine terminal facility becomes moot. As the Court has held that the permit to Coeur Alaska was properly issued, there is no basis for granting the relief requested as to Goldbelt, Inc. The same rationale applies to the ROD issued by the Forest Service.

VI. CONCLUSION/ORDER

Based upon the foregoing, Plaintiffs' Motion for Summary Judgment at Docket No. 41 is **DENIED**; and the Cross-Motion for Summary Judgment filed by the Federal Defendants at Docket No. 80 is **GRANTED**.

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[52] *Akootchook v. United States*, 271 F.3d 1160, 1167 (9th Cir. 2001).

IT IS HEREBY ORDERED THAT the complaint be, and it hereby is, **DISMISSED**, with prejudice.

The Clerk of the Court to enter judgment accordingly.

Dated at Anchorage, Alaska, this 3rd day of August 2006.

s/ James K. Singleton, Jr.

JAMES K. SINGLETON, JR.
United States District Judge

**APPENDIX C**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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|---|---|
| SOUTHEAST ALASKA CONSERVATION COUNCIL; et al.,<br><br>Plaintiffs-Appellants,<br>v.<br><br>UNITED STATES ARMY CORPS OF ENGINEERS; et al.<br><br>Defendants-Appellees,<br><br>and<br><br>COEUR ALASKA, INC.; et al.<br><br>Defendant-Intervenors- Appellees. | No. 06-35679<br><br>D.C. No. 1:05-cv-00012-JKS<br>District of Alaska<br>Juneau<br><br>ORDER |

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny the Federal Appellees' Petition for Limited Panel Rehearing.

Judge Graber has voted to deny the petitions for rehearing en banc of Intervenor-Appellee Goldbelt, Inc., Intervenor-Appellee Coeur Alaska, Inc., and Appellee State of Alaska. Judge Hug and Judge Tashima have voted to recommend denial of the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b)

The petitions for rehearing en banc are DENIED.

## APPENDIX D

**TITLE 33—NAVIGATION AND NAVIGABLE WATERS**

**CHAPTER 26—WATER POLLUTION PREVENTION AND CONTROL**

**SUBCHAPTER III—STANDARDS AND ENFORCEMENT**

**Sec. 1311. Effluent limitations**

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

***

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

**TITLE 33—NAVIGATION AND NAVIGABLE WATERS**

**CHAPTER 26—WATER POLLUTION PREVENTION AND CONTROL**

**SUBCHAPTER III—STANDARDS AND ENFORCEMENT**

**Sec. 1316. National standards of performance**

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment

(including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

* * *

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

* * *

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

## TITLE 33—NAVIGATION AND NAVIGABLE WATERS

## CHAPTER 26—WATER POLLUTION PREVENTION AND CONTROL

## SUBCHAPTER IV—PERMITS AND LICENSES

### Sec. 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

**TITLE 33—NAVIGATION AND NAVIGABLE WATERS**

**CHAPTER 26—WATER POLLUTION PREVENTION AND CONTROL**

**SUBCHAPTER IV—PERMITS AND LICENSES**

**Sec. 1344. Permits for dredged or fill material**

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

**TITLE 33—NAVIGATION AND NAVIGABLE WATERS**

**CHAPTER II—CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY, DEPARTMENT OF DEFENSE**

**PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE**

**Sec. 323.2 Definitions.**

For the purpose of this part, the following terms are defined:

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(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any

structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See Sec. 323.4 for the definition of these terms). See Sec. 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.